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of equity upon oral allegations, without written pleadings, would be an idle act, of no force beyond that of an advisory proceeding of the chancellor; and the reason is that the courts are not authorized to exert their power in that way.

The doctrine stated by counsel is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend in the extent or character of its judgment the law which is applicable to it. The statement of the doctrine by Mr. Justice SWAYNE in the case of *Cornell v. Williams*, 20 Wall. 250, is more accurate. "The jurisdiction," says the justice, "having attached in the case, everything done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud."

It is not within the power of the jurisdiction of the District Court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out, and the benefit of the citation to him thus denied. For jurisdiction is the right to hear and determine, not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and therefore could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction.

The judgment of the Corporation Court is affirmed.

Supreme Court of Indiana.

STATE OF INDIANA v. HENRY THROCKMORTON.

There may be an unlawful intention to kill and yet the killing be only manslaughter, if it be without malice, as e. g., upon sudden heat or quarrel.

Therefore, an indictment for assault and battery with intent to commit manslaughter, is good.

Where a statute provides that upon an indictment for an offence, consisting of different degrees, the jury may find the defendant not guilty of the degree charged, but guilty of any degree inferior thereto; the jury, upon an indictment for assault and battery with intent to murder, may find a verdict of guilty of assault and battery with intent to commit manslaughter. Therefore, where an indictment charged in the first count an assault with intent to murder, and in the second, an assault with intent to commit manslaughter, and the court on motion quashed the second

count, on the ground that there was no such crime as an assault with intent to commit manslaughter, it was *held*, that although it was error to quash the second count, yet as the defendant might have been convicted of the offence therein charged under the first count, the judgment would not be reversed.

APPEAL from the Allen County Criminal Court.

Throckmorton, the appellee, was indicted for an aggravated assault and battery. The indictment was in two counts. The second of which was as follows: "The grand jurors aforesaid upon their oath aforesaid do further charge and present that Henry Throckmorton, at said county of Allen and state of Indiana, on the seventh day of October, A. D. 1875, in and upon one William Meredith did make an assault, and him, the said William Meredith did then and there feloniously and unlawfully touch, in a rude, insolent and angry manner, with intent then and there and thereby him, the said William Meredith, unlawfully and feloniously to kill, contrary to the form of the statute, &c." This count was quashed by the court below, on the ground that it charged an assault and battery with intent to commit manslaughter, and the court being of the opinion that there was no such crime known to the law.

Samuel M. Hench, prosecuting attorney for the state.

Stratton & Stratton, for appellee.

The opinion of the court was delivered by

DOWNEY, J.—Of manslaughter there are two kinds, voluntary and involuntary. It may be conceded that there can be no such thing as an assault, or an assault and battery, with intent to commit manslaughter of the involuntary kind. But not so we think as to voluntary manslaughter. The statute defines manslaughter as follows: "If any person shall unlawfully kill any human being without malice, express or implied, either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter, &c.:" 2 G. & H. 438, sect. 8. The next following section is the one on which this indictment is founded. It reads as follows: "Every person who shall perpetrate an assault or an assault and battery with intent to commit a felony, shall, upon conviction thereof, be imprisoned, &c." We are aware that many criminal lawyers of this state are of the opinion that there can be no such thing as an

assault, or an assault and battery, with intent to commit manslaughter. It is said by Judge Bicknell in his work on Criminal Law, that "there can be no indictment for an assault and battery with intent to commit the crime of manslaughter, because the peculiarity of manslaughter is that it is free from unlawful intention to kill:" Bicknell's Crim. Prac. 292. It is a mistake to say that there can be no unlawful intention to kill in voluntary manslaughter: *Murphy v. The State*, 31 Ind. 511. Mr. Bishop, in his work on Statutory Crimes, sect. 508, expresses the opposite view to that taken by Judge Bicknell, and thinks such view contrary to the actual course of things in the other states, and "not sound as general American doctrine." In New Hampshire there was a statute providing "that if any person shall make an assault upon another, with intent to commit any crime described in this chapter, the punishment whereof shall be, &c., he shall be punished," &c., and manslaughter was among the crimes described; it was held that this provision embraced among the rest an assault with intent to commit manslaughter: *The State v. Collegan*, 17 N. H. 253. In *Murphy v. The State*, *supra*, the court, in speaking of the instructions given, said: "By these instructions the jury were told in effect, that there could be no purpose to kill in manslaughter, and that if such a purpose were shown to exist, the killing would be murder. This we think is not a correct exposition of the law. The killing may be unlawful and purposely done, and yet, if it is done without malice, in a sudden heat and transport of passion, caused by a sufficient provocation, it is only manslaughter. It was so held in *Dennison v. The State*, 13 Ind. 510." A reference to the case in 13 Ind. will show that the question was there so decided. The case of *Dennison v. The State* is cited and followed in *Hoss v. The State*, 18 Ind. 349, and *Long v. The State*, 46 Ind. 582. But notwithstanding we are of the opinion that the second count in the indictment was good, we cannot reverse the judgment because the court held it bad. The first count charged the defendant with an assault and battery with the intent feloniously, purposely and with premeditated malice to kill and murder. Upon this count the prisoner was tried and acquitted. There is no doubt, we think, that the defendant might, had the evidence warranted it, been found guilty on the first count of an assault and battery with intent to commit manslaughter: Bishop's Statutory Crimes, sect. 503. The state was not, therefore, injured by the ruling of

the court in quashing the second count of the indictment. It will follow from this ruling that a party indicted for an assault, or an assault and battery with intent to commit murder in the first degree, may, if the evidence justify it, be convicted of the assault, or assault and battery with intent to commit murder in the first or second degree, or to commit manslaughter, or he may be acquitted of any felonious intent and found guilty of the assault or assault and battery only. It has been held that a party may be indicted of an assault, or an assault and battery with intent to commit murder in the second degree: *The State v. Kesler*, 8 Blackf. 575. In such case, therefore, there may be a conviction, if the evidence warrant it, of the assault or assault and battery, with intent to commit murder in the second degree, or to commit manslaughter, or, as in the other case, there may be an acquittal of any intent to commit a felony, and a conviction of the assault or assault and battery only. If a party be indicted of an assault or an assault and battery with intent to commit manslaughter, he may in a proper case be convicted of the whole charge, or he may be acquitted of the intent to commit manslaughter and found guilty of the misdemeanor only. These rules are deducible from sect. 72, p. 405, 2 G. & H., which provides that upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto.

The judgment is affirmed.

Supreme Court of New Brunswick.

THE SPRING HILL MINING COMPANY v. SHARPE ET AL.

The condition of a bond given for the faithful discharge of the duties of the treasurer of an incorporated company, declared that S. (the treasurer) should well and truly account with the company, and the directors thereof, whenever required, for all moneys, &c., which should come into his hands as treasurer, and should well and faithfully obey all such by-laws, orders, directions and instructions as the board of directors of the company should make, prescribe and appoint. One of the by-laws of the company required that the treasurer should make his cash deposits in the bank of New Brunswick, as the money was received, and that all checks to draw the same should be signed by the president, or two directors of the company, and countersigned by the treasurer. In an action on the bond, alleging as a breach, that S. had received money as treasurer, which he had neglected to pay over on request, and had converted to his own use, the surety pleaded, that before any breach of the bond, S., with the knowledge, consent and authority of the directors, did not deposit the money in the bank of New Bruns-